From: Hostetler, Eric (ENRD)
Location: Ex. 6 - Personal Privacy code Ex. 6 - Personal Privacy
Importance: Normal
Subject: CPP: Discussion re Options for Informing Court of OMB Proposal Transmission
Start Date/Time: Fri 6/9/2017 5:30:00 PM
End Date/Time: Fri 6/9/2017 6:00:00 PM

;

To: Jordan, Scott[Jordan.Scott@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
Cc: Lynk, Brian (ENRD)[Brian.Lynk@usdoj.gov]; Kolman, Chloe (ENRD)[Chloe.Kolman@usdoj.gov]
From: Hostetler, Eric (ENRD)
Sent: Mon 5/15/2017 7:54:01 PM
Subject: CPP supplemental briefs as filed
EPA FILED SUPPLEMENTAL BRIEF.pdf
EPA Supplemental Brief.pdf
PETITIONERS' SUPPLEMENTAL BRIEFS.pdf
ENVIRONMENTAL INTERVENORS.pdf
State Supplemental Brief.pdf
INTERVENOR POWER COMPANIES.pdf
TRADE ASSOCIATION INTERVENORS.pdf
Petitioners.pdf
State Respondent Intervenors.pdf
Environmental Supplemental Brief.pdf

Attached are copies of our Clean Power Plan and new source supplemental briefs as filed this afternoon, along with copies of the other parties' supplemental briefs.

Thanks much for your assistance with these.

Eric

To: Fotouhi, David[fotouhi.david@epa.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]
From: Jordan, Scott
Sent: Mon 5/15/2017 3:01:06 PM
Subject: CPP/New Source Briefs - Last Chance Review Drafts
ENV_DEFENSE-#806678-v1-New_Source__FINAL_MAY_15_BRIEF.DOC
ENV_DEFENSE-#806679-v1-CPP__Final_May_15_Supplemental_Brief.DOC

David -

Eric just sent the attached, and confirmed that we need to provide any further edits before Noon.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Sent: Monday, May 15, 2017 10:56 AM
To: Jordan, Scott
Subject: Final Drafts

Here are the present final drafts. Our front office has provided final sign-off on these. This will go into production promptly at noon.

To: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
From: Jordan, Scott
Sent: Mon 5/15/2017 1:48:38 PM
Subject: Re: CPP Litigation - Supplemental Brief re Abeyance vs Remand - Text re status of review

Ex. 5 - Attorney Client

Thanks,

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Sent: Friday, May 12, 2017 6:58 PM
To: Jordan, Scott
Cc: Schmidt, Lorie; Zenick, Elliott
Subject: Re: CPP Litigation - Supplemental Brief re Abeyance vs Remand - Text re status of review

Thanks Scott. I will share the suggested language with our front office. **Ex. 5 - Deliberative Process**

Ex. 5 - Attorney Client

Sent from my iPhone

On May 12, 2017, at 6:35 PM, Jordan, Scott <Jordan.Scott@epa.gov> wrote:

Eric -

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

To: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Jordan, Scott
Sent: Mon 5/15/2017 12:08:37 PM
Subject: Re: Clean Power Plan supplemental brief update
ENV_DEFENSE-#806490-v1-CPP__MAY_12_DRAFT_SUPPLEMENTAL_BRIEF.DOC

Eric - Other that adding in text on the status of our review (which you note was not added in this draft), I do not have any comments or questions on this.

Lorie and Elliott - I have not seen any comments from David or seen any email from David stating he had no comments since I sent the drafts of the two supplemental briefs to him on Friday at 10:00 am. Have either of you heard anything? Should one of us send a reminder that we need to get any further comments to DOJ early this morning?

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Sent: Friday, May 12, 2017 7:02 PM
To: Jordan, Scott; Zenick, Elliott; Schmidt, Lorie
Subject: Fwd: Clean Power Plan supplemental brief update

FYI. I'm forwarding the most recent draft sent to our front office a short while ago and incorporating their most recent edits (this draft doesn't yet reflect your new suggested status language).

To: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
From: Jordan, Scott
Sent: Fri 5/12/2017 10:35:56 PM
Subject: CPP Litigation - Supplemental Brief re Abeyance vs Remand - Text re status of review

Eric -

Ex. 5 - Attorney Client

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
From: Jordan, Scott
Sent: Fri 5/12/2017 12:23:03 PM
Subject: Fw: Clean Power Plan supplemental brief update
ENV_DEFENSE-#806490-v1-CPP__MAY_11_DRAFT_SUPPLEMENTAL_BRIEF.DOC
ENV_DEFENSE-#806532-v1-New_Source__May_11_Draft_Supplemental_Brief.DOC

How should we present these to David for his review? Do we need to put these into CTS, or would it be fine to send them to David in an email. Finally, I am happy to send them to David, but will hold off until I hear from you in case you prefer to do it.

Ex. 5 - Attorney Client

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Sent: Thursday, May 11, 2017 5:41 PM
To: Jordan, Scott; Zenick, Elliott; Schmidt, Lorie
Subject: FW: Clean Power Plan supplemental brief update

I'm attaching revised clean drafts of the existing and new source supplemental briefs. The existing source draft largely adopts Brandon and Eric Grant's suggestions – but see a few explanatory notes in my email to Brandon below where we made further edits.

Note I'll be working from home tomorrow morning and can be reached on my cell at Ex. 6 - Personal Privacy Ex. 6 - Personal Privacy

Eric

From: Hostetler, Eric (ENRD)
Sent: Thursday, May 11, 2017 5:28 PM
To: Middleton, Brandon (ENRD) <BMiddleton@ENRD.USDOJ.GOV>; Grant, Eric (ENRD) <EGrant@ENRD.USDOJ.GOV>
Cc: Gelber, Bruce (ENRD) <BGELBER@enrd.usdoj.gov>; Vaden, Christopher (ENRD) <CVaden@ENRD.USDOJ.GOV>; Lipshultz, Jon (ENRD) <JLipshultz@ENRD.USDOJ.GOV>; Lynk, Brian (ENRD) <BLYNK@enrd.usdoj.gov>; Kolman, Chloe (ENRD) <CKolman@ENRD.USDOJ.GOV>; Grishaw, Letitia (ENRD) <LGRISHAW@enrd.usdoj.gov>; Rave, Norman (ENRD) <NRave@ENRD.USDOJ.GOV>; Berman, Amanda (ENRD) <ABerman@ENRD.USDOJ.GOV>
Subject: RE: Clean Power Plan supplemental brief update

Thanks Brandon and Eric. Please find attached a revised clean draft incorporating your helpful suggestions. A few comments and thoughts on the revised text:

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

In terms of timing going forward, note that our paralegal staff will need to have the full day on Monday to prepare tables of contents and authorities and to prepare the 30 copies of the briefs for transmission of the Court by hand by the 4:00 deadline. So we'd like to wrap the substance of this up tomorrow.

To: Minoli, Kevin[Minoli.Kevin@epa.gov]; Fotouhi, David[fotouhi.david@epa.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Jordan, Scott[Jordan.Scott@epa.gov]
From: Srinivasan, Gautam
Sent: Fri 4/28/2017 5:00:15 PM
Subject: CPP order issued
ENV_DEFENSE-#804486-v1-admin_su_cpp_order_april_28_2017.PDF

Apologies for any duplication but the DC Cir has ordered the CPP litigation be placed in abeyance for 60 days. By May 15, the parties are to file supplemental briefs addressing whether the cases should be remanded to the agency rather than held in abeyance.

Not including Justin as I believe he is recused.

++++++++++++

202-564-5647 (o)

202-695-6287 (c)

From: Lipshultz, Jon (ENRD) [mailto:Jon.Lipshultz@usdoj.gov]
Sent: Friday, April 28, 2017 10:48 AM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Jordan, Scott <Jordan.Scott@epa.gov>
Cc: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Subject: CPP order issued

Hot off the presses. See attached. **Ex. 5 - Attorney Client**

Ex. 5 - Attorney Client

Jack Lipshultz

Assistant Section Chief

Environmental Defense Section

(202) 514-2191

To: Jordan, Scott[Jordan.Scott@epa.gov]
From: Schmidt, Lorie
Sent: Wed 4/12/2017 11:54:11 PM
Subject: FW: last call: CPP admin denial and new source

fyi

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

From: Middleton, Brandon (ENRD) [mailto:Brandon.Middleton@usdoj.gov]
Sent: Wednesday, April 12, 2017 7:50 PM
To: Fotouhi, David <fotouhi.david@epa.gov>
Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Subject: RE: last call: CPP admin denial and new source

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

From: Fotouhi, David [mailto:fotouhi.david@epa.gov]
Sent: Wednesday, April 12, 2017 7:48 PM
To: Middleton, Brandon (ENRD) <BMiddleton@ENRD.USDOJ.GOV>
Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Subject: RE: last call: CPP admin denial and new source

Thanks, Brandon. Lorie and I are reviewing now and should be able to give you the all-clear soon.

David Fotouhi

Deputy General Counsel

Office of General Counsel

U.S. Environmental Protection Agency

Tel: +1 202.564.1976

fotouhi.david@epa.gov

From: Middleton, Brandon (ENRD) [mailto:Brandon.Middleton@usdoj.gov]
Sent: Wednesday, April 12, 2017 7:44 PM
To: Fotouhi, David <fotouhi.david@epa.gov>
Subject: last call: CPP admin denial and new source
Importance: High

David,

We are about ready to file. Any last minute thoughts?

Brandon

To: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Jordan, Scott
Sent: Wed 4/12/2017 8:13:29 PM
Subject: CPP Abeyance Motion Reply

Eric –

Here are David Fotouhi's comments on the CPP main case reply:

Ex. 5 - Deliberative Process -- Attorney Client

Nits:

-Page 4: The cite to Devia v. NRC in footnote 2 should be a complete citation, and the later citation on page 5 in the body text to that case should be a short citation.

-Page 6: "agency" in first partial paragraph should be capitalized.

-Page 7: Missing space in case citation for Chamber of Commerce case ("642_F.3d")

-Page 8: Swap space/comma in Landis case citation.

-Page 9: Portland Cement case citation missing date.

-Page 10, note 5: Toilet Goods Ass'n case missing date.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

Cc: Kolman, Chloe (ENRD)[Chloe.Kolman@usdoj.gov]
To: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
From: Jordan, Scott
Sent: Thur 4/6/2017 6:27:13 PM
Subject: Re: Clean Power Plan Reconsideration Denial Case: Enviros opposition to abeyance
Enviros' Opposition to Reconsideration Abeyance.pdf

Just a few additional thoughts on this opposition on holding the CPP reconsideration denial case in abeyance:

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Sent: Thursday, April 6, 2017 11:45 AM
To: Schmidt, Lorie; Jordan, Scott; Zenick, Elliott
Cc: Kolman, Chloe (ENRD)
Subject: FW: Clean Power Plan Reconsideration Denial Case: Enviros opposition to abeyance

The enviros' opposition to the recon case abeyance motion was also filed yesterday. Our reply to this one also due next Wednesday.

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Jordan, Scott[Jordan.Scott@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
Cc: Kolman, Chloe (ENRD)[Chloe.Kolman@usdoj.gov]
From: Hostetler, Eric (ENRD)
Sent: Thur 4/6/2017 3:45:38 PM
Subject: FW: Clean Power Plan Reconsideration Denial Case: Enviros opposition to abeyance
Enviros' Opposition to Reconsideration Abeyance.pdf

The enviros' opposition to the recon case abeyance motion was also filed yesterday. Our reply to this one also due next Wednesday.

To: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
Cc: Berman, Amanda (ENRD)[Amanda.Berman@usdoj.gov]; Kolman, Chloe (ENRD)[Chloe.Kolman@usdoj.gov]; Lynk, Brian (ENRD)[Brian.Lynk@usdoj.gov]; Rave, Norman (ENRD)[Norman.Rave@usdoj.gov]
From: Jordan, Scott
Sent: Thur 4/6/2017 1:47:07 PM
Subject: Motions for Abeyance - Scott's Thoughts on Reply

My initial thoughts for reply are below. I hope they are helpful. Please let me know if I need to clarify any points, or if you think a call would be helpful.

Ex. 5 - Deliberative Process -- Attorney Client

Ex. 5 - Deliberative Process -- Attorney Client

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Sent: Wednesday, April 5, 2017 3:56 PM
To: Schmidt, Lorie; Jordan, Scott; Zenick, Elliott
Cc: Berman, Amanda (ENRD); Kolman, Chloe (ENRD); Lynk, Brian (ENRD); Rave, Norman (ENRD)
Subject: RE: Clean Power Plan: States' Opposition to Motion for Abeyance Filed

The Intervenor States have filed —two days in advance of Friday's deadline—their opposition to our motion for abeyance. Please find attached a copy. In terms of timing, we have one week to file a reply, or until next Wednesday April 12. But if the other intervenors file their oppositions later in the week, then we probably will want to ask the Court to set a deadline for us to file a consolidated reply that is 7 days after the last-filed opposition (i.e. Friday, April 14 if the other oppositions are filed on Friday).

If you'd like to set up a call to exchange preliminary thoughts on this, let me know.

Eric

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Fotouhi, David[fotouhi.david@epa.gov]
From: Jordan, Scott
Sent: Thur 4/6/2017 11:36:16 AM
Subject: CPP and New Source Rule cases - Opposition Filings on Motions for Abeyance
Enviro Opposition.pdf
Enviros' New Source Opposition.pdf
New Source States' Opposition.pdf
State Opposition.pdf
State Oppostion Exhibit 1.pdf
State Opposition Exhibit 2.pdf

Here are the following opposition briefs on our motions for abeyance in the CPP and New Source Rule litigations:

1. Environmental Groups' Opposition in CPP case

2. Environmental Groups' Opposition in New Source Rule case

3. Intervenor States' Opposition in CPP case (and two attachments)

4. Intervenor States' Opposition in New Source Rule case.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Schmidt, Lorie
Sent: Wednesday, April 5, 2017 7:33 PM
To: Jordan, Scott; Zenick, Elliott; Fotouhi, David
Subject: CPP Litigation

Scott -- Could you please send David our motion for abeyance in the CPP cases and the oppositions that were filed today?

Also – Eric (DOJ) has asked that we let him know tomorrow if we have any initial thoughts about what should go in our reply brief, which is due in a week.

Lorie

Lorie Schmidt

Associate General Counsel, Air and Radiation

Office of General Counsel

US Environmental Protection Agency

(202)564-1681

To: Fotouhi, David[fotouhi.david@epa.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
From: Jordan, Scott
Sent: Thur 4/6/2017 11:35:56 AM
Subject: Fw: CPP and New Source Rule Litigation Update - Motions for Abeyance, Executive Order and Federal Register Notices
Executive Order.Promoting Energy Independence and Economic Growth.3.28.17.pdf
ENV_DEFENSE-#801503-v1-North_Dakota_(DC_Cir)_(NSPS)___As-docketed_EPA_Ab....pdf
CPP ABEYANCE MOTION.PDF
CPP Review Notice 3 28 2017.pdf
GHG EGU NSPS Review Notice 3 28 2017.pdf
GHG Federal Plan and CEIP Withdrawal Notice 3 28 2017.pdf

David -

Per Lorie's request, I am forwarding the motions for abeyance that we filed in the CPP and New Source Rule cases. I am also including the EO and our "initiate review" FR notices (for your convenience, and because they were part of the original email).

The opposition filings will be send in a minute in a follow-on email.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Jordan, Scott
Sent: Wednesday, March 29, 2017 8:53 AM
To: Jordan, Scott <Jordan.Scott@epa.gov>
Subject: CPP and New Source Rule Litigation Update - Motions for Abeyance, Executive Order and Federal Register Notices

Yesterday, DOJ filed motions to hold the CPP litigation and the New Source Rule litigation in abeyance.

Attached are those motions for abeyance, as well as the Executive Order signed yesterday by

the President, and three Federal Register Notices related to these rules (the CPP Review notice, the New Source Rule Review notice and the notice withdrawing CPP-related proposed rules concerning a federal implementation plan, model trading rules, and the Clean Energy Incentive Program) signed yesterday by Administrator Pruitt.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Jordan, Scott[Jordan.Scott@epa.gov]
Cc: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]; Lipshultz, Jon (ENRD)[Jon.Lipshultz@usdoj.gov]; Lynk, Brian (ENRD)[Brian.Lynk@usdoj.gov]
From: Kolman, Chloe (ENRD)
Sent: Thur 6/29/2017 4:53:34 PM
Subject: 111(b)/(d) status reports - as filed
111B 6-27-17 status report.pdf
111D 6-27-17 status report.pdf

EPA team –

Here are the latest CPP/New Source status reports as filed.

Best,

Chloe

Chloe H. Kolman

Trial Attorney

United States Department of Justice

Environment & Natural Resources Division

Environmental Defense Section

P.O. Box 7611, Ben Franklin Station

Washington, DC 20044

chloe.kolman@usdoj.gov

202-514-9277

To: Kolman, Chloe (ENRD)[Chloe.Kolman@usdoj.gov]
Cc: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]; Lynk, Brian (ENRD)[Brian.Lynk@usdoj.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
From: Jordan, Scott
Sent: Tue 6/27/2017 10:54:16 AM
Subject: Fw: Drafts of next CPP status reports
ENV_DEFENSE-#809672-v1-111(d)_-_6_29_17_status_report.DOCX
ENV_DEFENSE-#809671-v1-111(b)_-_second_status_report_-_6_29_17.DOCX

Chloe -

These status reports have been reviewed up through OGC and by Mandy Gunasekara, and we have no suggested edits or questions. Further, there are no new developments in the review of the CPP or New Source Rule to be reported.

Thanks,

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Kolman, Chloe (ENRD) <Chloe.Kolman@usdoj.gov>
Sent: Monday, June 19, 2017 1:15 PM
To: Jordan, Scott; Zenick, Elliott
Cc: Lynk, Brian (ENRD); Hostetler, Eric (ENRD)
Subject: Drafts of next CPP status reports

Scott and Elliott –

Attached are the drafts of our next 111 b/d status reports, due next week. Please let me know if there are any updates on the Agency's or OMB's review that require new language in the highlighted sections.

Thanks,

Chloe

Chloe H. Kolman

Trial Attorney

United States Department of Justice

Environment & Natural Resources Division

Environmental Defense Section

P.O. Box 7611, Ben Franklin Station

Washington, DC 20044

chloe.kolman@usdoj.gov

202-514-9277

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
From: Jordan, Scott
Sent: Tue 6/20/2017 11:02:25 AM
Subject: Fw: Drafts of next CPP status reports
ENV_DEFENSE-#809672-v1-111(d)_-_6_29_17_status_report.DOCX
ENV_DEFENSE-#809671-v1-111(b)_-_second_status_report_-_6_29_17.DOCX

Lorie and Elliott -

DOJ has provided us with draft status reports for the CPP and New Source Rule cases. Our deadline for filing these is next Thursday, June 29.

These draft status reports are mostly the same text as the status reports that we filed previously. The key text to review in these drafts is in yellow highlight on p.3 in each draft. The current highlighted text looks accurate to me, but we need to confirm with management that there are no recent developments that should be reported.

Ex. 5 - Attorney Client

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Kolman, Chloe (ENRD) <Chloe.Kolman@usdoj.gov>
Sent: Monday, June 19, 2017 1:15 PM
To: Jordan, Scott; Zenick, Elliott
Cc: Lynk, Brian (ENRD); Hostetler, Eric (ENRD)
Subject: Drafts of next CPP status reports

Scott and Elliott –

Attached are the drafts of our next 111 b/d status reports, due next week. Please let me know if there are any updates on the Agency's or OMB's review that require new language in the highlighted sections.

Thanks,

Chloe

Chloe H. Kolman

Trial Attorney

United States Department of Justice

Environment & Natural Resources Division

Environmental Defense Section

P.O. Box 7611, Ben Franklin Station

Washington, DC 20044

chloe.kolman@usdoj.gov

202-514-9277

To: Zenick, Elliott[Zenick.Elliott@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]
Cc: Skinner-Thompson, Jonathan[Skinner-Thompson.Jonathan@epa.gov]; Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]
From: Jordan, Scott
Sent: Mon 6/12/2017 7:19:18 PM
Subject: RE: Draft Supplemental Status Report
ENV_DEFENSE-#808898-v1-CPP__June_12_Supplemental_Status_Report.docx

Any word on this?

If we get sign-off, or if there are any edits, please let Eric know directly, so there is no delay in him getting that information.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Zenick, Elliott
Sent: Monday, June 12, 2017 10:56 AM
To: Jordan, Scott <Jordan.Scott@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Cc: Skinner-Thompson, Jonathan <Skinner-Thompson.Jonathan@epa.gov>
Subject: RE: Draft Supplemental Status Report

I had nothing to add. Lorie, are we ok or do we need to clear with mandy?

From: Jordan, Scott
Sent: Monday, June 12, 2017 10:55 AM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Skinner-Thompson, Jonathan <Skinner-Thompson.Jonathan@epa.gov>
Subject: FW: Draft Supplemental Status Report

Eric just called to check on this. He is hoping to file this today, if possible.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Jordan, Scott
Sent: Friday, June 09, 2017 2:30 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Skinner-Thompson, Jonathan <Skinner-Thompson.Jonathan@epa.gov>
Subject: Fw: Draft Supplemental Status Report

FYI - I do not have any questions or suggested edits to the attached draft.

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Sent: Friday, June 9, 2017 2:19 PM
To: Jordan, Scott; Zenick, Elliott; Schmidt, Lorie; Skinner-Thompson, Jonathan
Subject: Draft Supplemental Status Report

Following up on our discussion, here's a draft supplemental status report, for your review and comment.

Thanks,

Eric

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
Cc: Skinner-Thompson, Jonathan[Skinner-Thompson.Jonathan@epa.gov]
From: Jordan, Scott
Sent: Mon 6/12/2017 2:54:54 PM
Subject: FW: Draft Supplemental Status Report
ENV_DEFENSE-#808898-v1-CPP__June_12_Supplemental_Status_Report.DOCX

Eric just called to check on this. He is hoping to file this today, if possible.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Jordan, Scott
Sent: Friday, June 09, 2017 2:30 PM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>; Skinner-Thompson, Jonathan <Skinner-Thompson.Jonathan@epa.gov>
Subject: Fw: Draft Supplemental Status Report

FYI - I do not have any questions or suggested edits to the attached draft.

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Sent: Friday, June 9, 2017 2:19 PM
To: Jordan, Scott; Zenick, Elliott; Schmidt, Lorie; Skinner-Thompson, Jonathan
Subject: Draft Supplemental Status Report

Following up on our discussion, here's a draft supplemental status report, for your review and comment.

Thanks,

Eric

To: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]
From: Jordan, Scott
Sent: Fri 6/9/2017 5:57:59 PM
Subject: Fw: CPP Litigation - Another reason to file Monday rather than wait until end of month

FYI

Scott Jordan

Air and Radiation Law Office

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Subject: CPP Litigation - Another reason to file Monday rather than wait until end of month

Ex. 5 - Attorney Client

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ORAL ARGUMENT HEARD ON SEPTEMBER 27, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF WEST VIRGINIA, et al., *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 15-1363 (and consolidated cases)

RESPONDENT-INTERVENOR PUBLIC HEALTH AND ENVIRONMENTAL A ORGANIZATIONS' OPPOSITION TO MOTION TO HOLD CASES IN ABEYANCE

Public Health and Environmental Respondent-Intervenors respectfully request this Court to deny the Environmental Protection Agency's ("EPA") extraordinary motion for indefinite abeyance of the Court's deliberations over the Clean Power Plan ("Rule"), which would have the effect of improperly suspending the Rule without review by any court, without any explanation, and without mandatory administrative process. The motion comes at the *latest* possible stage of the Court's review of the current Rule—after more than six months of deliberation following a full day *en banc* oral argument and almost a year after the conclusion of briefing—and is premised upon the *earliest* possible stage of a

review of the Rule that *may* lead to a new rulemaking of indeterminate length and outcome.

EPA's motion suffers from five fatal defects. First, the relief EPA seeks flouts the terms of the order by which the Supreme Court temporarily stayed enforcement of the Rule. The Supreme Court did not invalidate the Rule; consistent with the authority granted courts by the Administrative Procedure Act ("APA"), it issued a stay pending a decision by this Court and an opportunity for Supreme Court review. Now EPA wants the stay, but not the judicial review that formed the basis for it. Granting EPA's motion would effectively convert that temporary enforcement relief pending judicial review into a long-term suspension of the Rule likely continuing for years, without any court having issued any decision on the Rule's merits.

Second, that outcome violates fundamental requirements of the Clean Air Act and the APA, which forbid agency suspensions of rules without notice and comment rulemaking and a reasoned explanation. Through the abeyance motion, EPA seeks the Court's assistance to do what it could not do otherwise: effectively and indefinitely suspend a duly promulgated rule without proposing, taking comment on, justifying, or defending in court any legal or factual premises that might support such a result.

Third, judicial economy strongly favors this Court proceeding to issue its decision. As noted, the motion comes after the case has been fully briefed, after ten judges of this Court invested time preparing for and hearing seven hours of oral argument, and after six months of judicial deliberation. Although the Rule's enforcement has been stayed pending that review, the Rule remains on the books and presumptively valid, and Respondent-Intervenors continue to stand fully behind it.

Fourth, abeyance would severely prejudice the public health and environmental Respondent-Intervenors. On behalf of their millions of members (and together with State Respondent-Intervenors representing tens of millions of their residents), Respondent-Intervenors have, for well over a decade, sought EPA standards to limit power plants' climate-destabilizing and health-endangering carbon dioxide emissions. If abeyance is granted, the planned regulatory review and possible new rulemaking proceedings presage, at a minimum, a long delay before any reductions in these emissions are required and implemented, leaving no regulatory protections in place.

Fifth, EPA has advanced only insubstantial arguments for abeyance. Rejecting the motion and deciding the current case would in no way interfere with EPA's "opportunity to fully review the Clean Power Plan," and to conduct a new rulemaking if it so chooses. Mot. to Hold Cases in Abeyance at 1-2, 5, *West*

Virginia v. EPA, No. 15-1363 (D.C. Cir. Mar. 28, 2016), ECF 1668274 (hereinafter "Mot."). That EPA's attorneys may have to defend the current Rule while the agency considers potential alternative policies is not an extraordinary situation; rather it reflects the rule of law and the way our governmental system works.

For all these reasons, this Court should reject attempts to further delay adjudicating the validity of EPA's Rule. The agency cannot be allowed to accomplish through abeyance something the it cannot do on its own: an indefinite suspension of a duly promulgated rule without judicial review, without a notice and comment rulemaking, and without any reasoned explanation.

ARGUMENT

The Supreme Court's order staying the Clean Power Plan expressly contemplates that the *courts* will decide its validity. Mindful of that stay and the prejudice it caused, this Court has proceeded with its review expeditiously. Now EPA and Petitioners want to extend the stay and avoid judicial review, both indefinitely. But Petitioners and EPA cannot agree to deprive Respondent-Intervenors of the benefits of the law by cutting off the only avenue to lift a stay. As long as Petitioners want to continue this challenge, and Respondent-Intervenors

stand ready to defend against it, there is no reason to halt this Court's review.[1] Five considerations manifestly favor continued adjudication.

I. The Requested Abeyance Would Flout the Terms of the Supreme Court's Stay Pending Review.

EPA's motion asks the Court to hold this case undecided and in abeyance for an indeterminate period while it reviews the Clean Power Plan and then possibly initiates a new rulemaking. Mot. at 8-9. The process EPA has initiated is likely to be long and complex. The original rulemaking that led to the Clean Power Plan took over four years, and involved sixteen public hearings, more than four million comments, hundreds of meetings with stakeholders, and a record that spans tens of thousands of pages. Now, EPA's Federal Register notice states that it is initiating a new review that may be "followed by a rulemaking process that will be transparent, follow proper administrative procedures, including appropriate engagement of the public, employ sound science, and be firmly grounded in the law," and includes a long list of legal and technical issues that EPA will reevaluate with respect to both the Rule and an unspecified number of "alternative

[1] Notably, the Supreme Court recently rejected the administration's request for abeyance in an analogous context in *National Association of Manufacturers v. Department of Defense*, No. 16-299 (U.S. Apr. 3, 2017), which concerned the proper forum for challenges to the (stayed) Clean Water Rule. There, as here, the government requested an indefinite abeyance premised on the earliest stages of its review of an agency rule. And there, as here, the effect of the abeyance would have been to indefinitely suspend a duly promulgated agency rule without judicial review, and without notice and comment rulemaking.

approaches," including resetting the deadlines. Mot. Attach. 2 at 3-5. Such a process will surely take years. Indeed, the Senior Administration Official who briefed reporters on the executive order conceded that: "whether two years, three years or one year, I don't know. It's going to take some time."[2] The motion asks this Court for an abeyance lasting until 30 days after the end of that process. EPA seeks to have enforcement of the Rule stayed for this entire time. Mot. at 8-9.

The requested abeyance perverts the purpose of the Supreme Court's stay, which imposed only a temporary halt in the enforcement of the Clean Power Plan pending judicial review. The Supreme Court explicitly contemplated that the stay would last only until this Court's decision on the merits of the Rule and an opportunity for Supreme Court review. Order in Pending Case, *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016) (enforcement stayed "pending disposition of the applicants' petitions for review" in this Court and "disposition of" any petition for certiorari).

The original stay applicants asked for nothing more. The State challengers requested an order "temporarily divesting" the Clean Power Plan "of enforceability" pending this Court's disposition of the petitions for review and the disposition of any petition for certiorari. W. Va. Stay Application Reply at 29, No.

[2] Background Briefing on the President's Energy Independence Executive Order (Mar. 27, 2017), https://www.whitehouse.gov/the-press-office/2017/03/27/background-briefing-presidents-energy-independence-executive-order.

15A773 (Feb. 5, 2016). Likewise, the industry applicants argued that "[a] stay [was] warranted so the courts may assess whether EPA has … authority" to issue the Rule, and that "[t]he public interest is best served by allowing the courts to address the petitions for review." Bus. Ass'n Stay Application at 3, 23, No. 15A787 (Jan. 27, 2016).

Indeed, the statutory provision that Petitioners argued gave the Supreme Court power to enter the stay, APA section 705, authorizes courts to stay a rule only "pending judicial review." 5 U.S.C. § 705; W. Va. Stay Application Reply at 29 ("[T]he States' requested relief is a straightforward APA stay."). "[S]tays plainly must be tied to the underlying pending litigation when the APA … is the authority under which the stay is granted." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33 (D.D.C. 2012) (vacating EPA notice whose "purpose and effect" "plainly are to stay the rules pending reconsideration, not litigation").[3] Petitioners also cited 28 U.S.C. § 1651(a), which allows the Supreme Court and lower courts to issue writs "in aid of their respective jurisdictions." West Virginia Stay

[3] The legislative history of that APA provision makes clear that it was intended to "provide intermediate judicial relief … in order to make judicial review effective," and to "afford parties an adequate judicial remedy." S. Rep. No. 79-752 (1945), *reprinted in* Administrative Procedure Act: Legislative History, 79th Cong. 2d Sess., at 218 (1946).

Application at 5, No. 15A773 (Jan. 26, 2016). "[I]in aid of [courts'] jurisdictions" plainly contemplates relief during *court* review.

What EPA asks for here has nothing to do with a judicial remedy, making judicial review effective, or with judicial review of the Clean Power Plan at all. Instead, EPA seeks to halt judicial review, while at the same time benefitting from the Supreme Court's stay "pending … review." This is plainly contrary to both the letter and spirit of the APA. And the effect would be to create a perverse incentive against action: EPA could indefinitely prolong its consideration, retain the stay, and avoid addressing a pressing public threat. This Court should continue along the path charted by the Supreme Court when it entered the stay, and should not allow EPA to convert a limited stay *pending* judicial review into a long-term suspension of the Rule *without* judicial review. This factor alone warrants denial of the motion.

II. Abeyance Would Accomplish a Suspension Without Rulemaking, in Violation of the Clean Air Act and the APA.

The abeyance motion seeks to achieve a result that EPA has no authority to accomplish on its own: a suspension of the Rule without rulemaking. Both the Clean Air Act and the APA require EPA to undertake a formal rulemaking process before suspending a regulation. The Court should reject this effort to circumvent the statutes' requirements.

The case law is clear that rules cannot be suspended except through rulemaking. *Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324 (D.C. Cir. Jan. 19, 1996) (Section 705 "does not permit an agency to suspend without notice and comment a promulgated rule."); *Council of the S. Mountains v. Donovan*, 653 F.2d 573, 580 n. 28 (D.C. Cir. 1981) ("[D]eferring [a] requirement" is a substantive rule subject to notice and comment.); *see Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 206 (2d Cir. 2004); *Natural Res. Def. Council v. EPA*, 683 F.2d 752, 763 n. 23 (3d Cir. 1982). This bedrock principle of administrative law applies even where an agency plans a major change in policy. *See Envtl. Def. Fund v. Gorsuch*, 713 F.2d 802, 818 (D.C. Cir. 1983) (vacating EPA decision to suspend processing of permits pending anticipated changes to performance standards because the suspension was a "rule" that required notice and comment).

These APA requirements are incorporated into section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d), and apply with equal force to suspension of this Rule. Indeed, EPA's Federal Register notice announcing its review acknowledges that suspending the Rule would require a transparent and public rulemaking process. Mot. Attach. 2 at 3.

To suspend, revise, or rescind the Rule, section 307(d) requires EPA to first propose a rule presenting the factual data on which it is based, the agency's

methodologies, and its major legal determinations and policy considerations. 42 U.S.C. § 7607(d)(3). The agency must then allow an opportunity for public comment and a public hearing, *id.* § 7607(d)(5), and then must accompany the final rule with a reasoned explanation and a response to each significant comment and to any new data presented. *Id.* § 7607(d)(6)(A), (B). Notably, these Clean Air Act rulemaking requirements exceed those of the APA.

Observing these requirements is no less critical when an agency is changing its position. *See Encino Motorcars L.L.C. v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) ("'a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy'") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009))); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

EPA's abeyance motion, however, seeks this Court's help to accomplish a suspension of the Clean Power Plan indefinitely, to last as long as the agency may take in considering changes, without observing any of these rulemaking requirements. The Court should not countenance this maneuver.

III. Judicial Economy Strongly Favors this Court's Issuing its Decision.

Judicial economy strongly favors denying the abeyance motion. EPA's motion comes at the latest possible moment in this case, after ten judges have invested extraordinary amounts of time absorbing dozens of briefs from hundreds

of parties and amici, have heard nearly seven hours of oral argument, and have been deliberating for six months since. The amount of party and judicial resources that have been invested in this case are truly extraordinary, and comparable to very few other cases this Court has ever adjudicated.

EPA's mere intention to review the Clean Power Plan and consider a further rulemaking does not come close to rendering this case moot. The Clean Power Plan was duly promulgated and remains on the books today, even though enforcement has been temporarily stayed for the time necessary for judicial review. The Petitioners apparently still wish to challenge the Rule. Respondent-Intervenors continue to stand fully behind the legal and factual basis for the Rule, and, for reasons elaborated in the next section, will be severely harmed by further delay in abating power plants' dangerous carbon dioxide pollution.

Furthermore, whether, when, how, and to what degree EPA may repeal or revise the Rlan is at this point necessarily speculative. Indeed, the outcome of any rulemaking process necessary to revise or rescind the present rule is not—and cannot legally be—a foregone conclusion, as the Administration recognizes. *See* Mot. at 1, 5, 6, 8; Mot. Attach. 1 at 5 (§ 4) (ordering EPA to revise or rescind the Rule "if appropriate" and "consistent with applicable law"); Mot. Attach. 2 at 3; *see Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (it is unlawful for an agency official to irrevocably prejudge the outcome of a

rulemaking).[4] The Clean Power Plan was the product of years of effort by EPA, input from millions of stakeholders, and a massive scientific and technical record. Any effort to unwind or revise it would need to be at least as thorough, and such a process would surely take years. Meanwhile, this Court is at the very final stages of its review.

The Court has recognized the value to the administration of Clean Air Act programs of promptly adjudicating "primarily interpretative questions of comprehensive importance." *See Ala. Power Co. v. Costle*, 606 F.2d 1068, 1075 (D.C. Cir. 1979); *Ala. Power Co. v. Costle*, 636 F.2d 323, 344 (D.C. Cir. 1979).

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[4] Examples abound where an agency has declared an intent to revise a rule, even formally proposing a new rule, but ultimately (for a host of reasons both policy and practical) decided not to change the status quo. *See, e.g.*, *Mississippi v. EPA*, 744 F.3d 1334, 1341-42 (D.C. Cir. 2013) (two years after declaring its intent in the near term to initiate a rulemaking to revise a Clean Air Act standard for ozone pollution set by the Bush Administration, EPA decided not to change the standard after all); 70 Fed. Reg. 61,081 (Oct. 20, 2005) (proposed, but never finalized, regulatory amendments to New Source Review program); 62 Fed. Reg. 66,182 (Dec. 17, 1997) (proposing pretreatment standards for control of certain wastewater pollutants, withdrawn two years later, 64 Fed. Reg. 45,072 (Aug. 18, 1999)).

These are examples where agencies' initial interest in pursuing policy shifts foundered upon legal and factual obstacles and interaction with the public. Here, conditions in the power sector since the Clean Power Plan was finalized in 2015 make the Rule's emissions goals even easier to achieve demonstrating the attainability of deeper emissions reductions, and making a more lenient standard hard to justify. *See* MJ Bradley & Assoc., EPA's Clean Power Plan: Summary of IPM Modeling Results with ITC/PTC Extension slides 3, 13, 14 (June 2016), http://www.mjbradley.com/ reports/updated-modeling-analysis-epas-cleanpower-plan ("Overall, results indicate that CPP targets are less-costly to achieve" than originally projected.).

This consideration counsels strongly in favor of resolving key issues in this case now, as any administrative proceedings to review, and then possibly initiate a rulemaking to change the Rule will revolve around the same legal issues already briefed, argued, and considered in this case. Examples of such issues include: (1) whether issuance of mercury and air toxics standards under Clean Air Act section 112, 42 U.S.C. § 7412, precludes EPA from issuing carbon dioxide limits under Clean Air Act section 111(d); (2) whether the term "best system of emission reduction" limits standards to levels achievable only by individual power plants using on-site measures; and (3) whether any of the constitutional or federalism arguments against the Rule have merit.

These and other attacks on the validity of the Rule are ripe for resolution. If they are not decided now, the Court will face them again in the future, but only after the expenditure of significant additional administrative and judicial effort and further loss of time in curtailing power plants' dangerous pollution. *See AT&T Corp. v. FCC*, 841 F.3d 1047, 1054 (D.C. Cir. 2016) ("[J]udicial economy suggests that we address some of AT&T's other arguments to avoid relitigation of identical issues in a subsequent petition."); *Kaufman v. Mukasey*, 524 F.3d 1334, 1339 (D.C. Cir. 2008) (similar). Moreover, if EPA takes action to suspend, revise, or rescind the Clean Power Plan and the agency's action is found unlawful and vacated, the Court will find itself again needing to determine the validity of the

underlying Clean Power Plan. *See, e.g.*, *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("[B]y vacating or rescinding the rescissions proposed by [the new rule], the judgment of this court had the effect of reinstating the rules previously in force.").

Contrary to EPA's invocation of *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) ("*API*"), Mot. at 7-8, abeyance would not promote judicial economy in this case. Here, EPA seeks a prolonged abeyance of litigation concerning a final rule in order to undertake a massive and uncertain new proceeding that is currently "nascent." Mot. at 8. By contrast, the *API* court granted a short abeyance of litigation concerning a tentative EPA decision in order to allow the agency to complete a new rulemaking that was both legally required and already near its mandatory completion date.[5]

Nor do the other cases EPA cites support abeyance. Mot. at 7. In *New York v. EPA*, the court granted abeyance on its own motion, before any merits briefs had been filed, and with no stay in place. Order, *New York v. EPA*, No. 02-1387 (D.C.

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[5] EPA misleadingly quotes *API* for the proposition that "[i]t would hardly be sound stewardship of judicial resources to decide this case now," Mot. at 7, omitting the end of that sentence which continues "given that an already published proposed rule, if enacted, would dispense with the need for such an opinion in a matter of months." *API*, 683 F.3d at 388.

The *API* Court also concluded that the industry petitioner would not be harmed by a short abeyance. *Id.* at 389-90. Here, the harm to Respondent-Intervenors, *infra* § IV, is palpable.

Cir. Sep. 30, 2003). Likewise, in *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008), the Court granted abeyance (apparently without opposition) before any merits briefs were filed and with no stay in place. Respondent-Intervenors are aware of no case remotely similar to this one in which this Court has granted a motion for abeyance.

This Court's ruling on these issues will also promote regulatory certainty by resolving the basic legal questions raised by the challengers, while abeyance would magnify and prolong regulatory uncertainty. *See N.Y. Repub. State Comm. v. SEC*, 799 F.3d 1126, 1136 (D.C. Cir. 2015) ("[P]eople cannot reliably order their affairs in accordance with regulations that remain for long periods under the cloud of categorical legal attack.").

For these reasons, judicial economy overwhelmingly favors deciding the challenges to the Clean Power Plan now.

IV. Abeyance Would Severely Prejudice the Public Health and Environmental Intervenors and Their Millions of Members.

The Clean Power Plan sets the first federal limits on carbon pollution from existing power plants, the largest stationary sources of that pollution. Respondent-Intervenors have been seeking such limits for almost fifteen years. *See* Order, *New York v. EPA*, No. 06-1322, 2007 U.S. LEXIS 22688 (D.C. Cir. Sept. 24, 2007) (remanding State and environmental petitioners' challenges to EPA's failure to regulate power plant carbon dioxide standards under section 111 in light of

Massachusetts v. EPA, 549 U.S. 497 (2007)); *see also Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (rejecting States' federal common law nuisance suit seeking to reduce power plant carbon dioxide emissions because section 111 "speaks directly" to the subject); Complaint ¶ 32, *Our Children's Earth Found. & Sierra Club v. EPA*, No. 4:03-cv-0070-CW (N.D. Cal. Feb. 21, 2003) (seeking carbon dioxide standards for fossil fuel-fired power plants under section 111).

The record supporting the Rule shows that the promulgated Clean Power Plan will cut power plants' carbon dioxide emissions by nearly a third from 2005 levels by 2030, conferring average climate protection benefits valued at $20 billion per year when the program is fully implemented. 80 Fed. Reg. 64,662, 64,665, 64,934 (Oct. 23, 2015). It will also result in public health benefits valued at an additional $14-34 billion per year by 2030, by preventing up to 3,600 premature deaths, 90,000 children's asthma attacks, and 300,000 missed school and work days each year. *See id.* at 64,934; Regulatory Impact Analysis at 4-31 tbl. 4-24, Doc. No. EPA-HQ-OAR-2013-0602-37105 (Oct. 23, 2015).

EPA suggests that Respondent-Intervenors face no immediate harm from the postponement of judicial review because even if this Court decides the case, the stay would not be lifted "any time soon" and emissions reductions are required at the earliest in 2022. Mot. at 8. This argument does not withstand even minimal

scrutiny. EPA's own Notice acknowledges that "some compliance dates have passed or will likely pass while the CPP continues to be stayed," and that "*in light of the Supreme Court stay*" EPA would re-evaluate those deadlines. Mot. Attach. 2 at 3-4 (emphasis added). And while Respondent-Intervenors advocate minimizing any delay of the Rule's deadlines, just last week, EPA informed States that it intends to apply "day-to-day tolling" to compliance deadlines—so that the longer the stay is in effect, the later requirements to abate pollution will go into effect. *See, e.g.*, Letter from E. Scott Pruitt, Admin'r of EPA, to Matt Bevin, Governor of Kentucky (Mar. 30, 2017) (attached). All of this belies an assertion that an abeyance will have no effect on carbon pollution reductions. To the contrary, abeyance instead of a decision deprives Respondent-Intervenors of the only route to lifting the stay. And "[b]ecause [carbon pollution] in the atmosphere is long lived, it can effectively lock Earth and future generations into a range of impacts, some of which could become severe." 80 Fed. Reg. at 64,682 (quoting Nat'l Research Council, *Climate Stabilization Targets: Emissions, Concentrations, and Impacts over Decades to Millenia* 3 (2011)).

An order mothballing this case would leave our millions of members with no federal protections in place from this dangerous pollution with long-term impacts. Moreover, the combination of the judicial stay and abeyance would leave scant incentive for EPA to act, leaving the Rule in prolonged legal limbo for so long as

EPA asserts that it is reviewing the Clean Power Plan or working on a rulemaking to suspend, revise, or rescind it.

This Court in *API* warned against the very situation that EPA's abeyance motion presents, noting that "an agency can[not] stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review." 683 F.3d at 388. Here, granting abeyance would allow EPA to dodge review of issues upon which Respondent-Intervenors have been seeking judicial resolution for over a decade. *See* Order, *New York v. EPA*, No. 06-1322, 2007 U.S. LEXIS 22688 (D.C. Cir. Sept. 24, 2007) (remanding case to EPA).

The prolonged absence of protection is particularly problematic given the grave and urgent threat that climate change poses to human health and welfare. Ten years ago this week, the Supreme Court affirmed in *Massachusetts v. EPA* that carbon dioxide and other greenhouse gases are air pollutants under the Clean Air Act, that EPA must determine on statutorily relevant grounds whether they endanger public health and welfare, and that it must issue emission standards for these pollutants if it determines that question affirmatively. This Court then remanded the *New York* case to EPA for proceedings regarding power plants consistent with *Massachusetts*. *See id.* Since then, EPA has published and updated a comprehensive endangerment finding based upon thousands of scientific

studies documenting the serious threats that carbon dioxide and other greenhouse gas emissions pose for public health and welfare. EPA issued the Clean Power Plan in 2015, eight years after this Court's remand in *New York*.

Since *Massachusetts* was decided, the key indicators of climate change and the danger to public health and welfare have only worsened. The atmospheric concentration of carbon dioxide has risen from about 384 parts per million to about 406 parts per million;[6] global average surface temperatures have climbed steadily, with 2016 being the hottest year on record;[7] and sea levels have risen steadily, now causing (to give one example) "sunny day" flooding in the streets of Miami, Norfolk and other American cities.[8]

The leading peer-reviewed scientific assessments continue to document the urgency of action. For example, the 2016 report of the congressionally-mandated U.S. Global Climate Research Program, recently reported that climate change has increased Americans' "exposure to elevated temperatures; more frequent, severe,

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[6] *See e.g.*, Nat'l Oceanic & Atmospheric Admin., *Mauna Loa CO_2 Monthly Mean Data*, ftp://aftp.cmdl.noaa.gov/ products/trends/co2/co2_mm_mlo.txt (last visited Apr. 4, 2017).

[7] *See* Press Release, Nat'l Air & Space Admin., *NASA, NOAA Data Show 2016 Warmest Year on Record Globally* (Jan. 18, 2017), http://www.nasa.gov/press-release/nasa-noaa-data-show-2016-warmest-year-on-record-globally.

[8] *See* Justin Gillis, *Flooding of Coast, Caused by Global Warming, Has Already Begun*, N.Y. Times, Sept. 3, 2016, https://www.nytimes.com/2016/09/04/science/flooding-of-coast-caused-by-global-warming-has-already-begun.html.

or longer-lasting extreme events; degraded air quality; diseases transmitted through food, water, and disease vectors such as ticks and mosquitoes; and stresses to … mental health and well-being," and that "[e]very American is vulnerable to the health impacts associated with climate change."[9] The gravity of these unfolding harms and growing risks makes the extraordinary delay the government now seeks especially unwarranted.

V. Against These Urgent Concerns, EPA Has Advanced Only Insubstantial and Unpersuasive Arguments for Delay.

EPA repeatedly suggests that abeyance is warranted because EPA "should be afforded the opportunity to fully review the Clean Power Plan." Mot. at 1-2, 5. But nothing about this Court's adjudication of the Rule prevents EPA from conducting that review and initiating a new rulemaking. EPA likewise asserts that abeyance is warranted "to avoid compelling the United States to represent the current Administration's position on the many substantive questions that are the

[9] U.S. Glob. Change Research Program, *The Impacts of Climate Change on Human Health in the United States: A Scientific Assessment* 2 (Apr. 2016), https://s3.amazonaws.com/climatehealth2016/high/ClimateHealth2016_FullReport.pdf. *See also* Royal Acad. & U.S. Nat'l Acad. of Scis. *Climate Change, Evidence & Causes* 3 (2014) https://www.nap.edu/download/18730; U.S. Glob. Change Research Program, *Climate Change Impacts in the United States: Highlights* 2 (2014), http://nca2014.globalchange.gov/system/files_force/downloads/high/NCA3_ Highlights_HighRes.pdf?download=1 (2014) ("Climate change, once considered an issue for a distant future, has moved firmly into the present.").

subject of EPA's nascent review." Mot. at 9. But the Rule must be assessed based upon the administrative record. *Sec. & Exchange Comm. v. Chenery Corp.*, 318 U.S. 80, 87 (1983). In any event, since briefing and argument in this Court are finished, nothing further is required of EPA's counsel. EPA vaguely suggests that potentially having to address the merits in any future Supreme Court proceedings "could call into the question the fairness and integrity of the ongoing administrative process." Mot. at 8. That potential is purely speculative, and in any event agencies regularly enforce, and the Department of Justice regularly defends, existing regulations that predate the current Administration and differ from what officials might have promulgated had they been in office at the relevant time.

If accepted, EPA's argument here would allow any new administration to halt enforcement of, and litigation over, regulations adopted by its predecessor merely by announcing an intention to review those regulations, evading bedrock administrative law processes for changing them. *API*, 683 F.3d at 388. That is not how our system of law and government works.

If EPA is unwilling to further defend the Clean Power Plan in this Court or the Supreme Court, many other parties to the case stand ready to do so vigorously. Intervenors enjoy "full party status," *United States ex. rel. Einstein v. City of New York*, 556 U.S. 928, 932-34 (2009), and may defend public laws when the government does not. *See, e.g., United States v. Windsor*, 133 S. Ct. 2675, 2684-

89 (2013); *Flying J. Inc. v. Van Hollen*, 578 F.3d 569, 571-74 (7th Cir. 2009); *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002); *Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456-60, 463 (D.C. Cir. 1991); *cf. Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 571 (2007) (environmental organizations supporting EPA's regulation sought and were granted certiorari despite EPA's opposition to the petition on the grounds that it had proposed a new rule).

This Court's completing its deliberations would not call into question the "fairness and integrity" of the administrative process, nor prevent an incumbent administration from considering regulatory changes in due course. Rather, it would represent a proper exercise of the Court's jurisdiction. Indeed, the Supreme Court "recent[ly] reaffirm[ed] [] the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377, 1386 (2014)) (additional citations omitted). Thus, the Court's completing its work on this case would deprive EPA of none of its rights while avoiding substantial prejudice to Respondent-Intervenors.

CONCLUSION

The Court should deny EPA's request for abeyance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 5151 words.

CERTIFICATE OF SERVICE

I certify that on April 5, 2017, the foregoing Opposition was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ *Sean H. Donahue*

ORAL ARGUMENT PREVIOUSLY SCHEDULED FOR APRIL 17, 2017
DEFERRED PENDING DISPOSITION OF ABEYANCE MOTION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NORTH DAKOTA, et al., *Petitioners*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 15–1381 (and consolidated cases)

RESPONDENT–INTERVENOR PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS' OPPOSITION TO MOTION TO HOLD CASES IN ABEYANCE

Public Health and Environmental Intervenors oppose the Environmental Protection Agency's motion to hold in abeyance the consolidated challenges to EPA's Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units ("Rule"), 80 Fed. Reg. 64,510 (Oct. 23, 2015). Filed well after the close of briefing and only weeks before a scheduled oral argument, EPA's motion is premised solely upon the initiation of a lengthy review, now only in its "nascent" stage, Mot. to Hold Cases in Abeyance, at 9, *North Dakota v. EPA*, No. 15-1381, (D.C. Cir Mar. 28, 2017) ECF 1668276 [hereinafter "EPA Mot."], to consider

possible changes to the Rule. EPA's motion does not provide the requisite "extraordinary" grounds to further postpone oral argument or any good reason for the Court to decline to exercise its "virtually unflagging obligation," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), to decide a case over which it has jurisdiction. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014).

To be sure, EPA's motion here is presented in a different context than its abeyance motion in the Clean Power Plan case. See Mot. to Hold Cases in Abeyance, *West Virginia v. EPA*, No. 15–1363 (filed March 28, 2017), ECF 1668274. The Rule for new, modified, and reconstructed sources is currently in effect and not stayed, and oral argument and months of judicial deliberation have not occurred. But, as in the Clean Power Plan case, the mere initiation of an administrative "review" process here is no valid ground for indefinitely delaying judicial review of a final rule, and here too respondent-intervenors would be harmed by EPA's belated attempt to evade that review.

The Court has before it a live controversy over a critical environmental and public health safeguard adopted after years of administrative processes as prescribed by the Clean Air Act. Petitioners intend to keep their challenges to it alive, and respondent–intervenors stand ready to defend it. EPA's arguments for abeyance come belatedly, are notably thin, and would set a problematic precedent.

The Court should not countenance here something it has previously warned against – allowing an agency to dodge an imminent judicial ruling on a challenged rule simply by announcing an intention to review it.

BACKGROUND

This rulemaking follows almost 15 years of efforts –to compel EPA to meet its obligation under Clean Air Act section 111, 42 U.S.C. § 7411, to abate emissions of carbon dioxide, the principal climate–changing greenhouse gas, from the largest stationary sources. Beginning in 2002, States and environmental organizations (many of them respondent–intervenors here) filed a series of notice letters, lawsuits, and rulemaking comments seeking EPA regulation of carbon dioxide pollution from power plants under section 111.[1] When EPA issued power plant emissions standards in 2006 that failed to limit carbon dioxide, States and

[1] *See* Complaint, ¶ 32, *Our Children's Earth Found. and Sierra Club v. EPA,* No. 03-cv-00770-CW (N.D. Cal. Feb. 21, 2003) (after inaction following August 27, 2002 notice letter, see *id.*, ¶ 4, seeking carbon dioxide standards from fossil-fuel fired power plants), *proposed consent decree published for comment*, 68 Fed. Reg. 65,699 (Nov. 21, 2003), entry of Order Approving Consent Decree, Doc. No. 47 (Feb. 9, 2004). *See also* States of New York, *et al.*, Notice of Intent to Sue Under Clean Air Act § 304(b)(2) (Feb. 20, 2003), *available at* https://ag.ny.gov/sites/default/files/press–releases/archived/whitman_letter.pdf; Comments of Environmental Defense, Sierra Club, Clean Air Task Force, Natural Resources Defense Council, *et al.*, 9-16, EPA Doc. No. OAR-2005-0031 (Apr. 29, 2005) (urging that revised New Source Performance Standards for power plants must limit carbon dioxide emissions).

environmental organizations filed suit, arguing that EPA was required to issue standards for those emissions. Pet. for Review, *New York v. EPA*, No. 06–1322 (D.C. Cir. Sept. 13, 2006). After the Supreme Court (10 years ago this week) confirmed in *Massachusetts v. EPA*, 459 U.S. 497 (2007), that carbon dioxide and other greenhouse gases are air pollutants under the Clean Air Act, this Court remanded the *New York* case for proceedings regarding power plants consistent with *Massachusetts*. Order, No. 06–1322 (D.C. Cir. Sept. 24, 2007), ECF 1068052.

After a lengthy administrative process,[2] EPA promulgated the Rule in October 2015. 80 Fed. Reg. 64,510 (Oct. 23, 2015). The Rule sets out emissions standards for new, modified, and reconstructed power plants. It rests on an extensive administrative record reflecting broad participation of scientific experts; power companies and related industries; tribes, states and local governments; environmental groups; and interested members of the general public. 80 Fed. Reg. at 64,528-29.

[2] *See* 77 Fed. Reg. 22,392 (Apr. 13, 2012) (proposed rule for new fossil fuel-fired power plants); 79 Fed. Reg. 1430 (Jan. 8, 2014) (withdrawal of proposal); 79 Fed. Reg. 1430 (Jan 8, 2014) (further proposal for new sources); 79 Fed. Reg. 34,960 (June 18, 2014) (proposal for modified and reconstructed steam units).

Many entities petitioned for review, and many others intervened in support of the Rule. After petitioners twice delayed the briefing schedule,[3] a lengthy briefing process ensued involving dozens of parties and amici and more than 500 pages of briefing. The Court set oral argument for April 17, 2017.

On March 28, 2017 – just three weeks before that scheduled argument – EPA filed a motion to hold the case in abeyance, attaching to its motion an Executive Order entitled Promoting Energy Independence and Economic Growth, and a pre–publication version of an EPA "Notice of Review" (EPA Mot., Attach. 2) (since published at 82 Fed. Reg. 16,330 (Apr. 4, 2017)). EPA states that it plans to review the Rule and other regulations in light of factors enumerated in the Executive Order, such as whether the rule will "burden the development or use of domestically produced energy resources," EPA Mot., Attach. 1, § 1. *See also* Attach. 2, at 4-5. The Notice states that EPA will undertake a rulemaking process if it determines that "suspension, revision or rescission of the New Source Rule may be appropriate," and that any ensuing rulemaking will be "transparent, follow

[3] Petitioners first sought to extend the time for filing proposed briefing schedules until after a briefing schedule had been established in *West Virginia v. EPA*, *see* Mot. to Extend Time, No. 15-1381 (Jan. 6, 2016), ECF 1592154, and filed a motion to suspend the briefing schedule in May 2016 that postponed briefing by several months, *see* Mot. to Extend Briefing Schedule, No. 15-1381 (May 24, 2016), ECF 1614749.

proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law." *Id.* Attach. 2 at 3.

EPA's motion asks that this case be put in abeyance for an indeterminate period, until 30 days after the conclusion of the agency's review and "any resulting forthcoming rulemaking." EPA Mot. 8-9.

ARGUMENT

The validity of this important Rule, which was years in the making, presents a live controversy that is now poised for decision by this Court. EPA and petitioners fail to identify any extraordinary grounds for continued delay of oral argument, or even any valid reason for this Court not to proceed with this fully briefed case. EPA's motion for abeyance should be rejected.

I. Abeyance at this Late Stage of the Litigation Premised on a "Nascent" Administrative Review is Unwarranted.

A. EPA's Motion is Late and Comes after Major Investments of Litigation Efforts by Parties and the Court

EPA's abeyance motion comes after the completion of extensive briefing by the many parties and amici and was filed after the argument date and panel were announced and only three weeks before the scheduled oral argument. Although this Court has now removed the case from oral argument calendar pending disposition of EPA's motion, *Order*, No. 15-1381(Mar. 30, 2017), ECF 1668612, the fact that the request came so late in the process militates against granting the

requested relief. D.C. Cir. Rule 34(g) ("When a case has been set for oral argument, it may not be continued by stipulation of the parties, but only by order of the court upon motion evidencing extraordinary cause for a continuance."). The parties, amici, and the Court have spent substantial resources on this case, and EPA's motion does not come close to demonstrating "extraordinary cause" to put off argument and indefinitely delay the litigation at this late point.

B. A New Agency Review and Possible Future Initiation of a New Rulemaking do not Constitute Valid Grounds for Abeyance.

The fact that EPA is at the very beginning of a "review" to consider whether, potentially, to propose a new rule at some unspecified future time provides no compelling reason to mothball a case with over a decade of administrative history that is, finally, fully briefed and ready for argument.

The cases cited by EPA involved circumstances markedly different from those here. In *New York v. EPA*, the court granted abeyance on its own motion, and before any merits briefs had been filed, in light of an ongoing reconsideration proceeding. *Order*, D.C. Cir. No. 02–1387, 2003 U.S. App. LEXIS 20077 (Sep. 30, 2003). And in *Sierra Club v. EPA*, 551 F.3d 1019, 1023 (D.C. Cir. 2008) (No.

02-1135), the Court granted abeyance (apparently without opposition) pending reconsideration proceedings, also before any merits briefs were filed.[4]

At this point, there is no assurance whatsoever that EPA will ever complete its review of the Rule, propose any changes for notice and comment, or finalize any such changes, or how long this process will take. The Executive Order itself cannot, and does not purport to, change the status of the Rule. It can be changed only as it was made —by following the Clean Air Act's detailed rulemaking procedures, 42 U.S.C. § 7607(d). Whether, when, how, and to what degree EPA may repeal or revise the Rule is at this point "speculation" (as EPA's motion puts it, EPA Mot. at 9). *See id.*, Attach. 1 at 5 (§ 4) (ordering EPA to revise or rescind the Rule "if appropriate" and "consistent with applicable law"); *id.*, Attach. 2 at 3; *see Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979)

[4] Nor do any of the other cases cited by Petitioners support the relief requested here. See Petr. Resp. 3 (citing *California, et al. v. EPA*, No. 08-1178 (D.C. Cir., Feb. 25, 2009) (ECF No. 1167136); *Mississippi v. EPA*, 744 F.3d 1334, 1341 (D.C. Cir. 2013); Order, *Am. Petroleum Inst. v. EPA*, No. 08-1277 (D.C. Cir. Apr. 1, 2009) (ECF No. 1173675); Order, *Sierra Club v. EPA*, No. 09–1018 (D.C. Cir. Feb. 19, 2009) (ECF No. 1165868); *House of Representatives v. Burwell*, No. 16–5202, Order at 1 (Dec. 5, 2016) (ECF No. 1649251); Order, *Natural Resources Defense Council v. EPA*, No. 081250 (D.C. Cir. Dec. 3, 2008), ECF 1152283). None had been fully briefed – let alone scheduled for oral argument – at the time of the abeyance order. (No briefs at all had been filed in *Mississippi*; *American Petroleum Institute*, *Sierra Club*, and *NRDC*). None involved grounds for abeyance as preliminary and tentative as here– an internal consideration of whether to initiate a new rulemaking that would likely take years to complete, that has no prescribed or set timeline, and has not even begun. And none of the cited cases provide a published decision or any written analysis of the abeyance question.

(unlawful for an agency official to prejudge irrevocably the outcome of a rulemaking).

Examples abound where an agency has declared an intent to revise a rule or formally published a proposed rule, but ultimately decided – whether due to public opposition, resource constraints, legal or factual record obstacles, changed circumstances, or other reasons – not to finalize a new rule. For example, when President Obama took office in 2009, EPA declared its "inten[t] in the near term to initiate a rulemaking" to revise a Clean Air Act standard for ozone pollution set by the Bush Administration." Mot. to Hold Cases in Abeyance, at 3, *Mississippi v. EPA*, No. 08–1200 (Oct. 16, 2009), ECF No. 1211554. Approximately two years later, however, EPA withdrew its reconsideration proceedings, leaving the Bush–era standards in effect. *See Mississippi v. EPA*, 744 F.3d 1334, 1341–42 (D.C. Cir. 2013).[5]

[5] *See also*, *e.g.*, 70 Fed. Reg. 61,081 (Oct. 20, 2005) (proposed, but never finalized regulatory amendments to definition of "emissions increase" in Clean Air Act new source review regulations); 62 Fed. Reg. 66,182 (Dec. 17, 1997) (proposing pretreatment standards for control of certain wastewater pollutants, withdrawn two years later, 64 Fed. Reg. 45,072 (Aug. 18, 1999)); 55 Fed. Reg. 30,798 (July 27, 1990) (proposing regulations on RCRA corrective action, "most provisions" of which were withdrawn nine years later, 64 Fed. Reg. 54,604 (Oct. 7, 1999)); 52 Fed. Reg. 31,162 (Aug. 19, 1987) (proposing on–board refueling vapor recovery systems, only to decide, five years later, not to impose them, 57 Fed. Reg. 13,220 (Apr. 15, 1992), *vacated by NRDC v. EPA*, 983 F.2d 259 (D.C. Cir. 1993)).

In asking the Court to halt its deliberations, EPA relies primarily upon *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) ("*API*"). *API* is relevant here only insofar as it cautions *against* what EPA now seeks. There, the decision for which the challengers sought review—EPA's decision to omit their waste from an exemption—was itself tentative, *id.* at 387-88; by contrast, no one alleges that the Rule here is not final. Under a schedule imposed by a settlement agreement, EPA had "already published [a] proposed rule" and was required to finalize the rule "in a matter of months." *API*, 683 F.3d at 388-89.[6] Here, EPA describes its own efforts as "nascent," EPA Mot. at 9, and has merely professed its intent to review the Rule and, "if appropriate," propose revisions at some indefinite time in the future.

Indeed, the *API* court warned against the very situation present here. As the court emphasized, its decision should not be read "to say an agency can stave off judicial review of a challenged rule simply by initiating a new proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review." 683 F.3d at 388; *see also Am.*

[6] EPA misleadingly quotes *API* for the proposition that "'[i]t would hardly be sound stewardship of judicial resources to decide this case now," EPA Mot. at 8, omitting the end of that sentence which continues "given that an already published proposed rule, if enacted, would dispense with the need for such an opinion in a matter of months." 683 F.3d at 388.

Petroleum Inst. v. EPA, 906 F.2d 729, 739-40 (D.C. Cir. 1990) ("If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely.").

Here the risk of "perpetually dodg[ing] review" is all too real. The Rule itself was the long-awaited final product of a laborious effort to compel EPA to comply with its obligations under Clean Air Act section 111 and set carbon standards for power plants. Environmental groups filed a lawsuit seeking those standards in 2003, and EPA entered a consent decree agreeing to review its section 111 standards for power plants. *See supra*, n.1. Then, in 2006, some of the respondent–intervenors filed a case because EPA had failed to include carbon dioxide standards in the final rule, and this Court remanded that case in light of *Massachusetts v. EPA*. Order, *New York v. EPA*, No. 06-1322 (D.C. Cir. Sept. 24, 2007), ECF 1068052. Now, when a challenge to a Rule finally regulating those emissions is fully briefed and on the cusp of argument, EPA seeks to snatch it back and "stave off judicial review." Granting the motion here would go well beyond what *API* approved, and would present the very abuse the *API* court condemned. It would do so, moreover, in the face of the Supreme Court's post-*API* expressions of doubt over the "continuing vitality of the prudential ripeness doctrine," *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014). *See id.* (noting Court's "recent reaffirmation of the principle that 'a federal court's obligation to hear and

decide' cases within its jurisdiction 'is virtually unflagging'") (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377, 1386 (2014) (citations omitted)).[7]

C. EPA's Argument that Defending the Rule on the Books Might Interfere with a Possible New Rulemaking is Untenable, and, in Any Event, No Basis for Abeyance.

EPA suggests (EPA Mot. at 7-8) that continued litigation of this case might improperly constrain the agency's review and its potential new rulemaking process. Specifically, EPA argues that if oral argument were held in the midst of the agency's review, "counsel would likely be unable to represent the current Administration's position on the many substantive questions that are the subject of the nascent review," and that, if counsel "speculate[d] as to the likely outcome of the current Administration's review," it would "call into question the fairness and integrity of the ongoing administrative process." *Id.* 8-9.

These concerns lack merit. The Court's continued adjudication of these petitions does not impair EPA's ability to review the Rule or initiate a new

[7] Nor would EPA's proposed abeyance–for–administrative review approach have any clear efficiency benefits. In cases where the agency opens a new rulemaking but does not end up completely rescinding the prior rule – or when the rescinding rule is itself later invalidated – judicial review of the original rule may well have to proceed anyway, perhaps years after the fact. And agency error is more likely where the second rulemaking occurs without the benefit of a court decision addressing the issues in the prior rulemaking.

rulemaking to consider possible changes. See EPA Mot. 7 (citing *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 42 (1983)).

That EPA may have to enforce and defend a Rule that may not fully accord with the current Administration's views is not an extraordinary event; it is how the rule of law works. A new Administration's disagreement with regulations on the books may be a reason to initiate rulemaking to make changes, but it is not a basis for declining to defend and enforce current rules.

Even if EPA were to take the extraordinary step of refusing to defend the Rule, respondent–intervenors stand ready to do so. Intervenors enjoy "full party status," *U.S. ex rel. Eisenstein v. City of N.Y., N.Y.*, 556 U.S. 928, 932–34 (2009), and may defend public laws when the government does not, *e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2684-89 (2013); *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 477, 482-87 (9th Cir. 2010) (upholding private conservation intervenors' right to defend Bureau of Land Management regulations that agency no longer defended); *Flying J. Inc. v. Van Hollen*, 578 F.3d 569, 571-74 (7th Cir. 2009) (upholding private company permitted to intervene and defend Wisconsin statute regulating gasoline sales after state government declined to defend); *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002) (environmental intervenors could defend Forest Service's Roadless Rule despite

absence of appeal by agency); *Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456-60, 463 (D.C. Cir. 1991) (mining association allowed to defend Interior Department regulations against environmental group's challenge after Interior did not appeal; district court judgment for environmental plaintiffs reversed). And the administrative record that is the sole basis for review, *Camp v. Pitts*, 411 U.S. 138, 142 (1973), is complete and before the Court.

D. EPA's Requested Relief Would Undermine Federal Administrative Law.

Halting judicial review of final regulations at an advanced stage of the litigation simply because the new administration may initiate new rulemaking would disrupt and impede the orderly administration of the law. Doing so leaves existing rules in a protracted limbo state, sometimes for years. *See N.Y. Repub. State Comm. v. SEC*, 799 F.3d 1126, 1136 (D.C. Cir. 2015) ("people cannot reliably order their affairs in accordance with regulations that remain for long periods under the cloud of categorical legal attack").[8] It deprives both the public and agencies of the

[8] This Court has emphasized that statutory regimes with fixed periods for pre-enforcement judicial review reflect congressional judgments on the importance of expeditious resolution of regulatory challenges. *Ala. Power Co. v. Costle*, 606 F.2d 1068, 1075 (D.C. Cir. 1979) ("The judicial review provisions as well as other features of the Clean Air Act Amendments set a tone for expedition of the administrative process that effectuates the congressional purpose to protect and enhance an invaluable national resource, our clean air."); *see also Eagle-Picher Industries v. EPA*, 759 F.2d 905, 916 (D.C. Cir. 1985) (Superfund's broad pre-

benefit of judicial explication of "what the law is." *See AT&T Corp. v. FCC*, 841 F.3d 1047, 1054 (D.C. Cir. 2016) (addressing arguments to "avoid re–litigation of identical issues in a subsequent petition"); *cf. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) (discussing the public interest in judicial decisions).[9] It would invite the same strategic games by agencies that the *API* court denounced, i.e., efforts to stave off possibly inconvenient judicial rulings by announcing policy "reviews" and, on that basis, seeking indefinite postponement of judicial scrutiny. *See* 683 F.3d at 388.

II. This Case Is Far from Moot.

Petitioners (Petr. Resp. 4-6) urge that the current challenge would be moot if EPA chooses to initiate a new rulemaking and then finalizes a new regulation that rescinds or replaces the Rule. They further argue that, under *United States v.*

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enforcement review regime represents congressional judgement on need to avoid "needless delays in the implementation of an important national program").

[9] In addition to issues unique to the long–running dispute over EPA's obligation to regulate power plants' carbon dioxide emissions, this case presents legal issues of general importance to the administration of the Clean Air Act Section 111's pivotal New Source Performance Standards program. These include petitioners' arguments that technologies must be "commercially available" in order to support the "best system of emissions reduction," and that EPA must make a new endangerment finding when it regulates an additional pollutant from an existing source category, State Ptrs' Final Opening Br. 1, 34, 24-25, 34-36, No. 15-1381 (D.C. Cir. Feb. 3, 2017), ECF No. 1659341. All of these issues are fully briefed and ripe for decision (indeed, petitioners agreed to submit the latter issue for decision on the briefs, Joint Briefing Proposal at 1 (March 20, 2017), ECF No. 1666889).

Munsingwear, 340 U.S. 36 (1950), parties unhappy with the Court's decision of this case would have a basis for seeking to vacate that decision should the rulemaking change come in the interval between this Court's decision and final action by the Supreme Court on certiorari.

Merely to recite this argument is to note the multiple layers of speculation upon which it depends – and how far it departs from the established test for mootness. *See Nat'l Black Police Ass'n v. District of Columbia,* 108 F.3d 346, 349 (D.C. Cir. 1997) (case is moot where "events have so transpired that the decision will neither presently affect the parties' rights nor have a more–than–speculative chance of affecting them in the future").

Petitioners' argument rests upon a curious and unfounded confidence about the ultimate result of the EPA's nascent review. But consistent with presumptions of regularity, no one can now know the result of EPA's review and any rulemaking proceedings. *E.g.,* EPA Mot., Attach. 2 at 3. Petitioners' speculations as to the timing and content of future agency action do not provide grounds for abeyance.[10]

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[10] *Relf v. Weinberger*, 565 F.2d 722 (D.C. Cir. 1977) (cited in Pet'rs' Resp. 6), involved sharply different circumstances. There, this Court held that a challenge to regulations that the district court had ruled unlawful was moot where those regulations had never gone into effect, the agency had promulgated interim regulations in response to the district court's ruling, and the agency had stated its intention to issue new permanent regulations supplanting those the district court had held unlawful. *Id.* at 724–26. By contrast, petitioners' discursus on *Munsingwear* depends on free–floating speculations about what this Court,

This Court should reject petitioners' effort to maintain their challenges indefinitely while avoiding judicial decision of their claims. Having long asserted that the Rule is unlawful, petitioners now seek to delay indefinitely putting their claims to a judicial test – but without dismissing their challenges.

III. Respondent–Intervenors Would Be Prejudiced by an Abeyance.

No showing of prejudice" is required to justify the adjudication of live controversies or to trigger federal courts' obligation to decide cases properly before them. Nevertheless, EPA is wrong when it claims that respondent–intervenors would suffer "no harm" (EPA Mot. at 9) from the requested abeyance.[11] In fact, abeyance would allow EPA to evade judicial review on legal issues many respondent–intervenors have been seeking judicial resolution of for over a decade, *supra*, pp. 3-4 & n.1, and which petitioners continue to dispute, and would leave a long–sought rule in legal limbo indefinitely.

Petitioners' assertion that the Rule does nothing (Petr's Resp. 6–7) conflicts with their own repeated assertions that the Rule prevents new coal plants from being constructed. See Non–State Petitioners' Br. at 15 (asserting that the Rule "effectively precludes the construction of new steam generating units and shortens

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EPA, and the Supreme Court may do in the future, and provides no basis for avoiding the case that is before the Court.

[11] As this Court's rule disfavoring delays of cases scheduled for argument recognizes, Cir. Rule 34(g), pausing cases at this late stage inconveniences the parties and Court, as is certainly the case here.

the lives of existing units") (ECF No. 1659209). The Rule is highly valuable to and protective of respondent–intervenors and their members because it ensures, that for new coal plants that would emit carbon in massive volumes for decades, standards will be in place to limit that pollution, see 80 Fed. Reg. at 64,574, 64,642; Resp't EPA's Br. 79 (noting that additional carbon emissions from even a single uncontrolled new coal plant are extremely voluminous) (ECF No. 1659737). And petitioners, in their briefs attacking the Rule, describe it as the "statutory predicate" and "but-for cause" of the Clean Power Plan, which provides enormous health and environmental benefits. State Pet'rs' Final Opening Br. 2, 11–12, ECF. No. 1659341; see also N.D. Br. 7, ECF No. 1659075. In short, petitioners' efforts now to dismiss the Rule's importance are in error and provide no ground for deferring review.

CONCLUSION

The Court should deny EPA's motion for abeyance and reschedule the argument for the earliest practicable time.

Respectfully submitted,

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Counsel for West Virginia Highlands Conservancy, Ohio Valley Environmental Coalition, Coal River Mountain Watch, Kanawha Forest Coalition, Mon Valley Clean Air Coalition, and Keepers of the Mountains Foundation

CERTIFICATE OF COMPLIANCE

I certify that the foregoing response was printed in a proportionally spaced font of 14 points and that, according to the word-count program in Microsoft Word 2016, it contains 4440 words.

CERTIFICATE OF SERVICE

I certify that on April 5, 2017, the foregoing Response was filed via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ Sean H. Donahue

To: Jordan, Scott[Jordan.Scott@epa.gov]
Cc: Lynk, Brian (ENRD)[Brian.Lynk@usdoj.gov]
From: Kolman, Chloe (ENRD)
Sent: Fri 2/17/2017 6:19:04 PM
Subject: RE: Final Form brief filed in 111(b) Rule case
ENV_DEFENSE-#795039-v1-DN_1659075_PETITIONER_FINAL_BRIEF__1659075__filed_by_State_of_North_Dakota_in_15-1381__Service_Date__02_02_2017___Length_of_Brief__3_975_words_.PDF
ENV_DEFENSE-#795040-v1-DN_1659078_PETITIONER_FINAL_REPLY_BRIEF__1659078__filed_by_State_of_North_Dakota_in_15-1381__Service_Date__02_02_2017___Length_of_Brief__1_998_.PDF
ENV_DEFENSE-#795083-v1-DN_1659209_JOINT_PETITIONER_FINAL_BRIEF__1659209__filed_by_Murray_Energy_Corporation_in_15-1396__Energy_&_Environment_Legal_Institute_in_15-139.PDF
ENV_DEFENSE-#795084-v1-DN_1659210_JOINT_PETITIONER_FINAL_REPLY_BRIEF__1659210__filed_by_State_of_North_Dakota_in_15-1381__Murray_Energy_Corporation_in_15-1396__Energy.PDF
ENV_DEFENSE-#795116-v1-DN_1659341_JOINT_PETITIONER_FINAL_BRIEF__1659341__filed_by_Arizona_Corporation_Commission__Commonw
ENV_DEFENSE-#795117-v1-DN_1659342_JOINT_PETITIONER_FINAL_REPLY_BRIEF__1659342__filed_by_Arizona_Corporation_Commission__Cc

Sorry about that. I'm attaching here:

- **ND Final P brief**
- **States Final P brief**
- **Non-States Final P brief**
- **ND Final Reply**
- **States Final Reply**
- **Non-States Final Reply**

I will send intervenors and amicus separately.

Chloe

From: Jordan, Scott [mailto:Jordan.Scott@epa.gov]
Sent: Friday, February 17, 2017 12:57 PM

To: Kolman, Chloe (ENRD) <CKolman@ENRD.USDOJ.GOV>
Subject: Re: Final Form brief filed in 111(b) Rule case

Not yet. If you could send them at some point, that would be great.

Thanks,

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Kolman, Chloe (ENRD) <Chloe.Kolman@usdoj.gov>
Sent: Friday, February 17, 2017 12:36 PM
To: Jordan, Scott
Subject: RE: Final Form brief filed in 111(b) Rule case

Hi Scott –

Did Brian send you the suite of final form briefs?

Chloe

From: Jordan, Scott [mailto:Jordan.Scott@epa.gov]
Sent: Tuesday, February 07, 2017 11:16 AM
To: Lynk, Brian (ENRD) <BLynk@ENRD.USDOJ.GOV>; Hoffman, Howard <hoffman.howard@epa.gov>
Cc: Hostetler, Eric (ENRD) <EHostetler@ENRD.USDOJ.GOV>; Kolman, Chloe (ENRD)

<CKolman@ENRD.USDOJ.GOV>
Subject: Re: Final Form brief filed in 111(b) Rule case

Brian - Thanks. At some point (no rush), please send the final briefs from the other parties.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Lynk, Brian (ENRD) <Brian.Lynk@usdoj.gov>
Sent: Monday, February 6, 2017 5:44 PM
To: Hoffman, Howard; Jordan, Scott
Cc: Hostetler, Eric (ENRD); Kolman, Chloe (ENRD)
Subject: Final Form brief filed in 111(b) Rule case

Scott and Howard,

Attached are the final form brief of EPA and the separate addendum, which I filed a few minutes ago. The addendum contains the same statutes, and regulations and legislative history that accompanied our proof brief filing, but this time was filed separately in compliance with Circuit Rule 28(a)(5) due to its length.

Best regards,

Brian

To: Zenick, Elliott[Zenick.Elliott@epa.gov]; Jordan, Scott[Jordan.Scott@epa.gov]; Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Schramm, Daniel
Sent: Thur 5/11/2017 5:41:40 PM
Subject: RE: Clean Power Plan supplemental abeyance brief - Question re statement re SC Stay

Ex. 5 - Attorney Client

From: Zenick, Elliott
Sent: Thursday, May 11, 2017 1:19 PM
To: Jordan, Scott <Jordan.Scott@epa.gov>; Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Schramm, Daniel <Schramm.Daniel@epa.gov>
Subject: RE: Clean Power Plan supplemental abeyance brief - Question re statement re SC Stay

Ex. 5 - Attorney Client

From: Jordan, Scott
Sent: Thursday, May 11, 2017 1:01 PM

To: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Cc: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Subject: Clean Power Plan supplemental abeyance brief - Question re statement re SC Stay

Lorie and Elliott –

What do you think about Eric's question below?

Ex. 5 - Attorney Client

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) [mailto:Eric.Hostetler@usdoj.gov]
Sent: Thursday, May 11, 2017 12:51 PM
To: Jordan, Scott <Jordan.Scott@epa.gov>
Subject: RE: Clean Power Plan supplemental abeyance brief - update

Scott,

Ex. 5 - Attorney Client

Ex. 5 - Attorney Client

To: eric.hostetler@usdoj.gov[eric.hostetler@usdoj.gov]; norman.rave@usdoj.gov[norman.rave@usdoj.gov]; Jordan, Scott[Jordan.Scott@epa.gov]; Hoffman, Howard[hoffman.howard@epa.gov]
Cc: Holloway, Jay[jayholloway@eversheds-sutherland.com]
From: Belcher, Joshua
Sent: Mon 3/6/2017 10:31:35 PM
Subject: Petition for Review -- Service
Petition for Judicial Review; EPA Denial of Reconsideration, No. 17-1068 (6 Mar. 2017) (2).pdf
ATT00001.htm

Counsel --

Attached please find a petition for review of the EPA's denial of our clients' requests for reconsideration of certain aspects of the Clean Power Plan. We understand that it was agreed service could be accomplished via email. Please acknowledge your receipt. Thank you.

Regards,

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
Cc: Jordan, Scott[Jordan.Scott@epa.gov]
From: Hoffman, Howard
Sent: Thur 2/23/2017 9:10:46 PM
Subject: FW: FYI - CPP - NC Motion to Withdraw as Petitioner
ENV_DEFENSE-#796916-v1-CPP_North_Carolina_Motion_to_Withdraw_as_Pet.PDF

Howard J. Hoffman USEPA-OGC-ARLO (202) 564-5582(O) (240)-401-9721(C) Room 7415 WJC-North

Mailing address: Mail Code 7344A, 1200 Pennsylvania Ave. NW Washington, D.C. 20460

From: Rave, Norman (ENRD) [mailto:Norman.Rave@usdoj.gov]
Sent: Thursday, February 23, 2017 4:03 PM
To: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>; Berman, Amanda (ENRD) <Amanda.Berman@usdoj.gov>; Kolman, Chloe (ENRD) <Chloe.Kolman@usdoj.gov>; Lynk, Brian (ENRD) <Brian.Lynk@usdoj.gov>; Hoffman, Howard <hoffman.howard@epa.gov>; Jordan, Scott <Jordan.Scott@epa.gov>
Subject: FYI - CPP - NC Motion to Withdraw as Petitioner

The North Carolina DEQ has moved to withdraw as a petitioner from the case. Norman

Norman Rave

U.S. Dept. of Justice

Environmental Defense Section

P.O. Box 7611

Washington, D.C. 20044

(202) 616-7568

To: Fotouhi, David[fotouhi.david@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
Cc: Skinner-Thompson, Jonathan[Skinner-Thompson.Jonathan@epa.gov]; Conrad, Daniel[conrad.daniel@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]; Vijayan, Abi[Vijayan.Abi@epa.gov]
From: Jordan, Scott
Sent: Thur 4/27/2017 6:11:15 PM
Subject: CPP Litigation - DOJ thoughts on CPP Repeal impact on Abeyance Motions

I had a conversation with Eric Hostetler at DOJ. He is going to raise this to his management chain, but Eric had the following initial reactions:

Ex. 5 - Deliberative Process -- Attorney Client

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

To: Jordan, Scott[Jordan.Scott@epa.gov]
Cc: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Lipshultz, Jon (ENRD)[Jon.Lipshultz@usdoj.gov]
From: Schmidt, Lorie
Sent: Mon 3/27/2017 5:15:49 PM
Subject: Re: Revised Draft CPP Abeyance Motion

Ex. 5 - Deliberative Process

Sent from my iPhone

On Mar 27, 2017, at 1:11 PM, Jordan, Scott <Jordan.Scott@epa.gov> wrote:

Ex. 5 - Deliberative Process

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) [mailto:Eric.Hostetler@usdoj.gov]
Sent: Monday, March 27, 2017 12:55 PM
To: Jordan, Scott <Jordan.Scott@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Lipshultz, Jon (ENRD) <Jon.Lipshultz@usdoj.gov>
Subject: RE: Revised Draft CPP Abeyance Motion

Scott,

Ex. 5 - Deliberative Process

From: Jordan, Scott [mailto:Jordan.Scott@epa.gov]
Sent: Monday, March 27, 2017 11:42 AM
To: Hostetler, Eric (ENRD) <EHostetler@ENRD.USDOJ.GOV>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Lipshultz, Jon (ENRD) <JLipshultz@ENRD.USDOJ.GOV>
Subject: RE: Revised Draft CPP Abeyance Motion

Eric –

Two points on the attached draft:

Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) [mailto:Eric.Hostetler@usdoj.gov]
Sent: Monday, March 27, 2017 10:58 AM
To: Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Jordan, Scott <Jordan.Scott@epa.gov>; Zenick, Elliott <Zenick.Elliott@epa.gov>
Cc: Lipshultz, Jon (ENRD) <Jon.Lipshultz@usdoj.gov>; Lynk, Brian (ENRD) <Brian.Lynk@usdoj.gov>; Berman, Amanda (ENRD) <Amanda.Berman@usdoj.gov>; Rave, Norman (ENRD) <Norman.Rave@usdoj.gov>; Kolman, Chloe (ENRD) <Chloe.Kolman@usdoj.gov>
Subject: Revised Draft CPP Abeyance Motion

Ex. 5 - Deliberative Process

Eric

To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
From: Jordan, Scott
Sent: Thur 3/23/2017 5:07:07 PM
Subject: CPP Repeal Notice - DOJ reaction

Ex. 5 - Deliberative Process -- Attorney Client

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
To: Lipshultz, Jon (ENRD)[Jon.Lipshultz@usdoj.gov]; Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]
From: Jordan, Scott
Sent: Fri 3/24/2017 10:40:20 AM
Subject: CPP-Related Proposal Withdrawal Notice - For DOJ Review (close hold)
FR Notice.Withdrawal.FIP and CEIP 3-23 10 pm.docx

Jack and Eric -

Attached is the current version of the FR notice to withdraw the October 2015 proposal (FIP and Model Trading rules) and the June 2016 CEIP proposal. This is the draft as prepared in ARLO, and it is currently under review by the OGC Front Office and OAR.

This continues to be close hold.

Please let us know if you have any questions or comments.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

To: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]; Lynk, Brian (ENRD)[Brian.Lynk@usdoj.gov]
Cc: Zenick, Elliott[Zenick.Elliott@epa.gov]; Marks, Matthew[Marks.Matthew@epa.gov]
From: Jordan, Scott
Sent: Wed 3/8/2017 8:31:26 PM
Subject: FW: Trade Press Article re timing of CPP EO

FYI – Latest press on timing of CPP EO says unlikely this week. See article below.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Marks, Matthew
Sent: Wednesday, March 08, 2017 2:10 PM
To: Jordan, Scott <Jordan.Scott@epa.gov>
Subject: E.O. article

CLEAN POWER PLAN

Trump order now 'unlikely' this week

Robin Bravender, E&E News reporter

Published: Wednesday, March 8, 2017

An executive order aimed at repealing the Obama administration's signature climate change rule is now "unlikely" to come this week, according to a White House official.

The directive, which had been slated to be signed this week by President Trump, "may be pushed beyond this week," the official said.

Details about the exact timing and contents of that order remain unclear.

The document was previously expected to tackle energy and climate issues broadly by ordering U.S. EPA to undo the Obama administration's Clean Power Plan for greenhouse gases and a related rule to curb new power plants' emissions, and to repeal the coal leasing moratorium on federal lands. Some also speculated that the order could be

even broader, tackling additional Obama-era climate and energy policies.

But some sources now say the looming order may be narrower than expected, targeting only EPA rules to limit carbon dioxide emissions from new and existing power plants.

Some supporters of the Clean Power Plan have welcomed the delay, but critics of the rule are eager for the administration to take action.

"For those of us working on the issue, it's a bit frustrating that we don't have the executive order yet," said Jeff Holmstead, an industry attorney at Bracewell LLP who is representing clients suing EPA over the rule.

Matthew C. Marks

U.S. Environmental Protection Agency

Office of General Counsel

Air and Radiation Law Office

1200 Pennsylvania Avenue, NW

Washington, DC 20460

T: 202-564-3276

E: marks.matthew@epa.gov

Bcc: Jordan, Scott[Jordan.Scott@epa.gov]
To: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
From: Jordan, Scott
Sent: Tue 6/20/2017 11:02:25 AM
Subject: Fw: Drafts of next CPP status reports
ENV_DEFENSE-#809672-v1-111(d)_-_6_29_17_status_report.DOCX
ENV_DEFENSE-#809671-v1-111(b)_-_second_status_report_-_6_29_17.DOCX

Lorie and Elliott -

DOJ has provided us with draft status reports for the CPP and New Source Rule cases. Our deadline for filing these is next Thursday, June 29.

Ex. 5 - Deliberative Process -- Attorney Client

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Kolman, Chloe (ENRD) <Chloe.Kolman@usdoj.gov>
Sent: Monday, June 19, 2017 1:15 PM
To: Jordan, Scott; Zenick, Elliott
Cc: Lynk, Brian (ENRD); Hostetler, Eric (ENRD)
Subject: Drafts of next CPP status reports

Scott and Elliott –

Attached are the drafts of our next 111 b/d status reports, due next week. Please let me know if there are any updates on the Agency's or OMB's review that require new language in the highlighted sections.

Thanks,

Chloe

Chloe H. Kolman

Trial Attorney

United States Department of Justice

Environment & Natural Resources Division

Environmental Defense Section

P.O. Box 7611, Ben Franklin Station

Washington, DC 20044

chloe.kolman@usdoj.gov

202-514-9277

Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]
Bcc: Jordan, Scott[Jordan.Scott@epa.gov]
To: Fotouhi, David[fotouhi.david@epa.gov]
From: Jordan, Scott
Sent: Mon 5/15/2017 3:01:06 PM
Subject: CPP/New Source Briefs - Last Chance Review Drafts
ENV_DEFENSE-#806678-v1-New_Source__FINAL_MAY_15_BRIEF.DOC
ENV_DEFENSE-#806679-v1-CPP__Final_May_15_Supplemental_Brief.DOC

David -

Eric just sent the attached, and confirmed that we need to provide any further edits before Noon.

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) <Eric.Hostetler@usdoj.gov>
Sent: Monday, May 15, 2017 10:56 AM
To: Jordan, Scott
Subject: Final Drafts

Here are the present final drafts. Our front office has provided final sign-off on these. This will go into production promptly at noon.

To: Hostetler, Eric (ENRD)[Eric.Hostetler@usdoj.gov]
Cc: Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]
Bcc: Jordan, Scott[Jordan.Scott@epa.gov]
From: Jordan, Scott
Sent: Thur 5/11/2017 5:01:10 PM
Subject: Clean Power Plan supplemental abeyance brief - Question re statement re SC Stay

Lorie and Elliott –

What do you think about Eric's question below?

Ex. 5 - Deliberative Process -- Attorney Client

Scott Jordan

Air and Radiation Law Office

Office of General Counsel

202-564-7508

From: Hostetler, Eric (ENRD) [mailto:Eric.Hostetler@usdoj.gov]
Sent: Thursday, May 11, 2017 12:51 PM
To: Jordan, Scott <Jordan.Scott@epa.gov>
Subject: RE: Clean Power Plan supplemental abeyance brief - update

Scott,

Ex. 5 - Deliberative Process -- Attorney Client

Ex. 5 - Deliberative Process -- Attorney Client